IN THE SUPREME COURT OF FLORIDA'

ROBERT LEWIS BUFORD

Appellant,

vs.

Case No. 72, 592

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

Corrected

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The record on appeal, which is contained in two volumes, will be referred to by the symbol "R" followed by the appropriate page number. Record references, if necessary, to appellant's initial appeal will be referred to by the symbol "PR."

STATEMENT OF THE FACTS

Appellant would add and make the following clarification to the facts:

(1) In his initial appeal to this Court appellant complained that the trial court had erred in rejecting the mitigating circumstances of extreme mental and emotional disturbance or impaired mental capacity and discounting the effects of his consumption of alcohol, drugs and marijuana. In sustaining this rejection this Court said:

> Obviously the ability of the defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished capacity because of excessive consumption of alcohol, drugs, and marijuana. In view of the testimony presented, the trial judge correctly rejected defendant's "drinking" and "drug use" as a mitigating factor. Buford v. State, 403 So 2d 943, 953 (Fla 1981).

(a) In his detailed confession covering some 28 pages of transcript, (PR-711-739), appellant only alluded to ". . . a couple drink. . ." (PR-716). His two friends, who were with him that night, both testified that he "acted normal," (PR-494), "appear[ed] to be acting normal" (R-501) and "did not appear drunk." (PR-502). It was not until appellant testified at trial

that any testimony about excessive drinking and drug abuse was produced. Appellant testified to drinking and smoking marijuana with one Jacob Faison. **(PR-786-790)**. Faison, however, was never called to testify, either at appellant's trial or at the **1988** hearing.

(b) The psychiatric reports prepared in **1978**, before appellant's trial, and which were introduced in evidence at the **1988** hearing, **(R-168-169)** reflect that appellant was "not suffering from a severe mental illness or psychosis, a state of mental deficiency, or a condition of organic mental dysfunction," **(PR-44** i. e. Dr. Niswonger's report, emphasis supplied); was ". . .able to give a coherent account of his behaviors at the time of his offense. . .did not appear to be either depressed or delusional. . . and not presently in need of mental health treatment;" **(PR-19-20 -** report of Dr. Kaplan, psychologist); and showing ". . .no evidence of mental illness." (PR-47-report of Dr. Montero).

(2) At the penalty phase of appellant's **1978** trial his mother had already testified that appellant had been having a drug problem. **(PR-943-946)**.

(3) This Court also rejected the contention that the jury's life recommendation could also have been reasonably based on appellant's claim at trial that he was a mere accomplice led by "Fat Boy." ID. at **953**.

(4) The United States District Court, Middle District of Florida, Tampa Division, granted a petition for Writ of Habeas

Corpus only with respect to the sentence of death on the grounds that the trial court had failed to consider non-statutory mitigating factors in violation of the then recently decided Hitchcock v. Duqqer, **481** U.S. **393 (1987)** and ". . .remanded for penalty phase evidentiary hearing and resentencing before the trial judge in accordance with this order.''**(R-258).**

(5) At the resentencing evidentiary hearing held below before the judge, Dr. Thomas McClane, a psychiatrist, testifying in appellant's behalf, opined that at the time of the offense appellant was ". . .probably substantially intoxicated." (R-**135).**

Dr. McClane was also asked to opine as to whether the capital felony was committed while the defendant was under the influence of extreme or emotional disturbance under Fla. Stat **922.141** (b). The Doctor responded:

> A. I think - - I'll make two comments. One, including this as a period of his whole life after the first six or seven years. He was under mental and emotional disturbance. And then the factors bearing on right - - at the time of the offense. I think we reviewed earlier the factors that made this young man's life mentally and emotionally disturbed. To use the language here certainly was severely stressed which is obviously synonymously causing severe alcohol and drug abuse.
>
> And then at the time of the offense, it really depends partly whether one considers severe alcoholic intoxication in an extreme mental or emotional disturbance, and I'm not sure about the medical legal part of that

issue. Certainly from the purely psychiatric sense I do as I've described earlier.

(R-142-143).

Dr. McClane also opined that appellant's ability to conform his conduct to the requirements of the law were substantially impaired but not totally obliterated. (R-145)

The doctor also testified that ". . .there is a possibility however it may even evolve here that there was some domination by another individual whom related to Robert's psychiatric profile inclined to that domination." (R-145)

On cross-examination he conceded that he had read the transcript of .the testimony of three friends who saw appellant the night of the offense, two of which said appellant was not drunk, and the third that he couldn't tell. (R-152). He conceded that the testimony upon which he relied for the extent of intoxication was that of appellant's family members. (R-153). The doctor also admitted that most men, as intoxicated as he was opining, could not burglarize a home, pick up a young child carry her out of the home and walk with her some distance to another building and have sexual intercourse. (R-153-154). The Doctor also admitted that on an average there is " . . . a steady decrease in the ability of a male to perform sexually to get - - to achieve and to maintain an erection sufficient to have intercourse," (R-154); that "[i]n a sort of statistical sense it tells me that he wasn't so intoxicated that he couldn't get an erection." (R-155).

The doctor qualified the last statement by saying that the state was ". . .assuming that he did'' (R-155) have sexual intercourse apparently implying that there was some question about this. The assistant state attorney clarified to the court that the record disclosed that the victim's vagina and hymen were severely lacerated and bleeding and that there was male semen found in her vagina. (R-155).

The doctor also admitted that if one accepts appellant's statement to the police that appellant dropped the concrete block on his victim because she might identify him it would indicate clear thinking on appellant's part. (R-156-157).

SUMMARY OF ARGUMENT

Issues I and III - The jury override is governed by the law of the case since in 1981 this court sustained the jury override. The only reason there was a re-sentence in this case was for the trial court to consider non-statutory mitigating factors. The primary basis upon which appellant seeks to overturn the override was considered and rejected by this court in 1981.

Issue II - The lower court did not consider any non-statutory aggravating factors in the weighing process.

ISSUE I

THE TRIAL JUDGE ERRED IN IMPOSING A SENTENCE OF DEATH, AS THERE WAS EXTENSIVE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS TO SUPPORT THE JURY'S LIFE RECOMMENDATION, AND REASONABLE PEOPLE COULD DIFFER AS TO WHETHER DEATH OR LIFE IMPRISONMENT WAS THE APPROPRIATE SENTENCE.

Appellee believes it is feasible to first discuss appellant's assertion in subsection B of his Issue I that the decision of this court in appellant's original appeal is not the law of the case, (Appellant'sbr. p. 41). We do so because it places Issue I in its proper context.

Law of the Case

Appellee says that the law of the case should not apply because, first, a great deal of the mitigating evidence was developed at the 1988 penalty hearing and, second, because this is an exceptional circumstance requiring this court to reconsider the law of the case. (Appellant'sbr. p. 41-42).

We disagree on both counts. In the first place, the basic premise behind appellant's argument that the lower court should not have overridden the jury's verdict is that appellant was extremely intoxicated and because of this, combined with appellant's deprived childhood, he was both under extreme mental and emotional disturbance and had impaired mental capacity at the time of the offense. The 1988 hearing presented little new with respect to this contention. As hereinabove covered in the statement of facts, this court considered and rejected this argument on the first appeal, primarily, because of the details

of the crime appellant provided to the investigating officers. Buford, **403** So 2d at **953**.

Naturally, appellant now contends that he presented more evidence at the **1988** hearing, which, he says, supports the jury's recommendation and makes any facts suggesting override less convincing. He argues that where the evidence contains any significant mitigating evidence - whether statutory or non-statutory - to support the life recommendation, then the trial judge may not override it. But, if this court did not consider the intoxication and mental health mitigating evidence significant when it first decided this case in **1981**, then appellee fails to see how it suddenly becomes significant when the primary basis for discarding this mitigating evidence is the fact that appellant was able to provide the details of the crime, thus rendering the evidence questionable and properly rejectable by the sentencing authority.

Moreover, while appellant attempted to present more evidence in **1988** he presented little which carried greater weight. As we have pointed out in our statement of facts, Dr. McClane was forced to admit that two of the witnesses who observed appellant during a time period closest to the offense, said appellant was not intoxicated. A third said he could not tell. Dr. McClane was also forced to admit that a person in such an intoxicated state would have difficulty performing sexually. Consequently, the lower court was not only faced with the law of the case with respect to the two statutory mental circumstances, but it was not

presented with sufficient evidence to determine that this was an exceptional circumstance where reliance on this court's previous decision would result in a manifest injustice. Recently, this Court said:

> Finally, we recognize that this Court has previously stated that "an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case. Reconsideration is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice."
>
> Love v. State So 2d (Fla **1990**) **15** FLW S73, case no **73,401**, decided February **15, 1990**.

Significantly, this Court was speaking as to what an appellate court could do with respect to correcting erroneous rulings. In United States Gypsum Co. v. Columbia Casualty Co. **169** So **532, 535** (Fla **1936**) this Court explained law of the case:

> . . .the doctrine "law of the case" means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties continues to be the "law of the case," whether correct on general principles or not, *so* long as the facts upon which the decision was predicated continues to be the facts of the case before the court.

A trial court is without authority to alter or evade the mandate of an appellate court. Stuart v. Hertz Corp., **381** So 2d **1161** (Fla. **4** DCA **1980**). If the standard set out in Love is the standard by which an appellate court must guide itself in overruling its prior decision in a case then, ***a fortiori,*** a trial judge is even more strongly bound by the law of the case. The fact is, the lower court was powerless, absent guidance from this

Court, to disregard the law announced in Buford v. State, 403 So 2d 943, 953 (Fla 1981).

We foresee appellant arguing that even under the Gypsum decision the lower court could disregard the law of the case because the facts do not continue to be the same. We would disagree. The fact which caused this court to reject the two statutory mental mitigating circumstances - or at least to sustain the lower court's rejection of them - was that appellant was able to give the details of the crime to the investigating officers. This fact has not changed. Moreover, it was fortified through the cross-examination of Dr. McClane. In other words the law of this case, as established through this court's previous opinion, was that appellant's alleged intoxication and mental condition was not sufficiently strong to overrule the trial court's jury override. Since the lower court did not receive this case via remand from this Court, but as a result of a writ of habeas corpus issued out of a federal court, it continued to be bound by this court's decision with respect to all issues not mandated by the federal writ. Since the federal writ only required the trial court to consider non-statutory mitigating circumstances, this court's previous decision was not affected.

Considering that the lower court was bound by the law of the case it cannot be said to have erred in not giving consideration to the two statutory mental mitigating circumstances. It's "mandate" from the federal court was to consider non-statutory mitigating circumstances and place them on the scale. The

question remains whether this Court should, nevertheless, disregard it's own law of the case and consider the two statutory factors anew. In Johnson v. Duqqer, 523 So 2d 161, 162 (Fla. **1988)** this court said:

> Claims two and three were raised on direct appeal and, even though the jury override might not have been sustained today, it is the law of the case. In view of this Court's prior consideration of this issue, there has been no showing of prejudice.[1]

This case is essentially identical. While this Court might not sustain the jury override today, it is the law of this case. The facts upon which this court sustained the jury override continue to be the same. They have not changed. Appellant presented more evidence, but not more convincing evidence. "Quantity, however, is not the same as quality." Mills v. Duqqer, So 2d (Fla. **1990)** case 15 FLW **S114,** Justice McDonald, concurring in part, dissenting in part. In footnote **18** of his brief, appellant attempts to distinguish Johnson v. Duqqer by pointing out that this is a direct appeal from the sentence, whereas Johnson was a collateral attack. Appellee concedes as much. But, in the instant case, the new sentencing proceeding was obtained as a result of a collateral attack in federal court wherein no fault was found with anything done by this court on direct appeal.

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[1] More recently, this Court, citing Johnson said: Moreover, "even though the jury override might not have been sustained today, it is the law of the case." Porter v. Duqqer, **So** 2d (Fla. 1990), 15 FLW **S78,** case no. **74,478** decided February 15, **1990).**

At least insofar as the intoxication and the two statutory mental health mitigating circumstances are concerned there is no justifiable reason for this court to recede from the law it announced in the previous appeal.

The override was not improper even considering the additional non-statutory mitigating circumstances.

As the lower court observed in its sentencing order, this case ". . .poses somewhat of a judicial paradox . . . ." (R-219). Since the jury recommended life, appellant would not be desirous of another jury on re-sentencing, *so* no new jury considered the mitigating evidence which appellant presented at the 1988 sentencing hearing. Consequently, if there is now going to be a Tedder v. State, 322 So 2d 908, 910 (Fla. 1975) analysis, it must be one which considers whether the additional non-statutory mitigating factors are sufficiently weighty to now say that a override is improper.

Citing Welty v. State, 402 So 2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So 2d 996, 999 (Fla. 1982); McCampbell v. State, 421 So 2d 1072 (Fla. 1982); Cannady v. State, 427 So 2d 723 (Fla. 1983); Herzog v. State, 439 So 2d 1372 (Fla. 1983); Holsworth v. State, 522 So 2d 348 (Fla. 1988); Perry v. State, 522 So 2d 817 (Fla. 1988) and Cochran v. State, 547 So 2d 928 (Fla. 1989), appellant argues that " [w]hen the record contains any significant mitigating evidence - whether statutory or non-statutory - to support the life recommendation, then the trial judge may not override it." (Appellant's br. p. 27). While

we do not find such a precise statement in any of the above cited cases, accepting, arguendo, appellant's interpretation, we would submit that in the instant case there was no additional significant mitigating evidence presented at the 1988 hearing to support the life recommendation.

In the first place we would point out that in many of the above cited cases, e.g. Holsworth, Cannady, McCampbell, this Court pointed to certain mitigating factors as possibly influencing the jury in its life recommendation. There are none here to point to because the jury never considered those at the 1988 hearing and this Court sustained the rejection of the others on the first appeal.

As to those presented at the 1988 hearing, the lower court clearly found them to be insignificant. In its sentencing order the lower court considered and weighed this evidence as follows:

> The new evidence presented at the hearing on the non-statutory mitigating circumstances demonstrates a case of neglect, poverty, and lack of parental care or support. Most importantly, however, the evidence failed to establish that this background had any bearing or effect on the horrible crimes committed by the defendant. Lara v. State, 464 So 2d 1173 (Fla. 1985). Therefore, it is the judgment and conclusion of this Court that the mitigating circumstances, whether statutory or non-statutory, do not outweigh the aggravating circumstances, that the prior Judgement and Sentence of death is just, appropriate and is hereby confirmed.
>
> (R-221).

As Buford, 403 So 2d at 953, teaches, "[t]his finding is supported by the evidence. Consequently, it comes to this Court

with the presumption of correctness." - - unless, of course, because of Tedder and its progeny the presumption of correctness is no longer applicable to findings made by the sentencing authority with respect to the weight to be given to aggravating and mitigating circumstances.

In its order the lower court relied on this Court's previous decision in Lara v. State, 464 So 2d 1173, 1180 (Fla. 1985) wherein this Court observed:

> We agree with the trial judge that the only mitigating circumstance arguably applicable to this cause was the history of abuse suffered by appellant as a child and the difficulty at childhood. We also agree, however, that the trial court could properly conclude that appellant's actions in committing this murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance.[2]

Concededly, Lara was not a jury override case. But, it recognizes that the sentencing authority may properly conclude that the murder was not significantly influenced by the defendant's childhood experiences. Perhaps, if the jury had heard this testimony and had recommended death, this Court, as it did in Holsworth, Cannady, McCampbell, might have felt that the

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[2] Similarly in Rogers v. State, 511 So 2d 526 (Fla. 1987) this Court held that before effects of childhood traumas could be alone considered mitigating they must be relevant to the defendant's character, record or the circumstances of the crime. The lower court, as stated did not find them to have ". . . any bearing or effect on the horrible crimes committed by the defendant.''Again, since no jury heard any of the 1988 evidence there is nothing to override with respect to such evidence and the lower court's finding should carry a presumption of correctness.

jury was properly influenced by those factors. But, since those factors were not before the jury, but only before the sentencing judge the distinction would be without a difference.

Moreover, a similar contention was made in Pentecost v. State, 545 So 2d 861 (Fla. 1989), that is, that when there are significant mitigating factors present in the record, a jury override is improper. While this Court, in that case, did agree that the override was improper, in footnote 3, it said:

> In his brief Pentecost states: "If any mitigating factors are present in the record, the trial judge must impose a life sentence in accordance with the [jury's] recommendation," . . . We recede from any implication in *Feud v. State, 512 So 2d 176, 178 (Fla. 1987)* that an override is never warranted when valid mitigating factors exist. (emphasis supplied).

Our interpretation of Pentecost is not without support. In footnote 4 of Lusk v. Dugger, 890 F. 2d 332 (11th Cir. 1989) the Court of Appeals for the Eleventh Circuit, at length, rejected the contention that this Court interprets Tedder as meaning that if there is *any* basis to support a jury recommendation of life, then the trial judge must accept that recommendation.

Moreover, the introduction of the three mental health reports of Niswonger, Kaplan Montero render even more insignificant any new evidence concerning appellant's mental health at the time of the offense. They disclose that prior to trial appellant was not suffering from any mental deficiency and was not in any need of any mental treatment. He had been administered the Minnesota Multiphasic Personalty Inventory which

was considered invalid because appellant was attempting to exaggerate the degree of psychopathology he was experiencing. **(PR-19).** Thus there **is** no exceptional circumstance requiring this court to revisit its prior ruling with respect to appellant's mental health as mitigating factors.

Finally, we would observe that appellant is attempting to buttress his argument by suggesting that the lower court did not consider appellant's age and lack of any significant criminal history. We would disagree. The lower court was puzzled as to whether or not it could reweigh those factors, or only the additional mitigating factors as they additionally influenced the scale. It concluded, however, that in either case the ". . . the same result obtains regardless of which course of analysis and decision apply." **(R-220)**

The lower court stated that if it were reweighing the above two mitigating factors anew it would continue to find no significant criminal history despite evidence at the 1988 hearing that appellant did in fact engage in some criminal activity. **(R-220)** The Court did say, however, that if it were reweighing the age factor it could not find it to be a mitigating circumstance. **(R-221)** Appellant appears to argue that the lower court was compelled to find this factor. We disagree. Assuming the court was required to reweigh all the factors anew, the court was only compelled to consider age. This he did and rejected it.

ISSUE II

THE TRIAL JUDGE ERRED IN CONSIDERING, IN HIS DECISION TO OVERRIDE THE LIFE RECOMMENDATION AND IMPOSE A DEATH SENTENCE, THE POSSIBILITY THAT APPELLANT COULD BE RELEASED SOMEDAY AND COMMIT THE SAME TYPE OF CRIME AGAIN.

This exact issue was squarely before the Supreme Court of the United States in Wainwright v. Goode, **464** U **S 78, 104** S.Ct. **378, 78** L. Ed 2d **187 (1983).** When Arthur Goode was sentenced the sentencing judge made the following comment:

> In this particular case that is my opinion, and that is my order, and the only answer I know that will once and or all guarantee society, at least as far as it relates to this man, is that he will never kill main, torture or harm another human being. **. .**
>
> Wainwright v. Goode, **78** L Ed 2d at **190.** See also Goode v. Wainwright, **410 So** 2d at 508

His judgment and sentence were affirmed by this Court. Goode v. State, **365 So** 2d **381** (Fla. **1979).** Subsequently, he filed a petition in this Court claiming his appellate counsel was ineffective because he had failed to challenge the judge's reliance of "future dangerousness" as a nonstatutory aggravating factor. Goode v. Wainwright, **410** So 2d **506** (Fla. **1972).** This Court rejected the contention that the judge utilized the "future dangerousness" aspect in the weighing process. It distinguished its previous decision in Miller v. State, **373 So** 2d **882** (Fla. **1979)** because in Miller the sentencing authority had specifically stated in the record that were it not for the fact that in Florida life imprisonment did not mean life imprisonment he would

find that the mitigating factors outweighed the aggravating. See Goode v. Wainwright, 410 So 2d at 509.

Nevertheless, the Court of Appeals for the Eleventh Circuit granted a petition for writ of habeas corpus predicated on the trial judge relying on this "recurrence factor." Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982). The United States Supreme Court accepted certiorari and, without even the necessity of oral argument or brief on the merits, reversed the Court of Appeals.

It reversed on three grounds: First, because the Court of Appeals had considered a question of state law. The Court held that since consideration of "future dangerousness" in sentencing does not violate the Constitution, whether the sentencing authority could consider future dangerousness was a question of state law. See Wainwright v. Goode, 78 L Ed 2d 192. Second, because the Court of Appeals did not give deference to this Court's factual determination that the trial judge had not considered this factor in the weighing process. Wainwright v. Goode, 78 L Ed 2d at 192-193. And third, because

> Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness.
>
> Wainwright v. Goode, 78 L Ed at 194 (emphasis supplied)

In other words the High Court recognized that even if a trial judge improperly considers an aggravating factor, this

Court can, nevertheless, independently reweigh, absent that factor and determine that the sentence of death is proper.

This is not to say that appellee agrees that the lower court improperly considered future dangerousness as a factor in the weighing process. This is simply to point out that even if this Court determines that he did, this court can independently reweigh without the necessity of remand.

Moreover, as in Goode's case, the lower court did not consider future dangerousness as an aggravating factor. The lower court's sentencing order specifically limited itself to the two statutory aggravating circumstances. (R-220) At the time the lower court made the statement about which appellant now complains, appellant's counsel was arguing that consecutive life sentences would prohibit appellant from". . . walk[ing] the streets again" in mitigation of sentence. As we read the judge's statement he was questioning whether this would be sufficiently weighty as a mitigating factor. Regardless, the judge did not, as occurred in Miller, consider it as an aggravating factor. As stated, in Miller the trial judge had specifically stated that were it not for the possibility that appellant would be out in the streets he would find that the mitigating factors outweighed the aggravating. This made "future dangerousness" an aggravating factor.

ISSUE III

THE JURY'S LIFE RECOMMENDATION COULD ALSO REASONABLY HAVE BEEN BASED ON QUESTIONS AS TO THE RESPECTIVE ROLES OF APPELLANT AND DARRELL WILSON IN THE HOMICIDE.

The blame it on Darrell Wilson defense has been answered by this Court time and again in different forms. It was considered and rejected on appellant's original appeal, Buford v. State, **403 So** 2d **943** (Fla. 1981), on his habeas petition before this court alleging ineffectiveness of counsel. Buford v. Wainwright, **428 So** 2d **1389** (Fla. **1983)** and on his appeal from his motion for post conviction relief. Buford v. State, **492 So** 2d **355** (Fla. **1986).**

Appellant continues to contend that the jury override should not be sustained because the jury's life recommendation could have been reasonably predicated on its belief that the defendant was guilty of a felony murder, "fat boy" having been the real culprit.

This Court rejected this argument on the first appeal saying:

> A convicted defendant cannot be "little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.
>
> Buford v. State, **403 So** 2d at **953**

In other words, as we read this court's opinion, if the jury's life recommendation was based on the fact that appellant was not the primary culprit, it was an unreasonable basis upon which to recommend life, and the lower court properly overruled it. That, we submit, is the law of this case. Of course, if

what was unreasonable in 1981 is now unreasonable in 1990 then that is another matter. But, that is for this court to squarely say.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, the sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Steven L. Bolotin, Assistant Public Defender, P.O. Box 9000 Drawer PD, Bartow, Florida 33830 on this 27 day of March, 1990.

OF COUNSEL FOR APPELLEE